North Dakota Law Review

Volume 74 | Number 4 Article 3

1998

Strate v. A-1 Contractors: Intrusion into the Sovereign Domain of Native Americans

Wambdi Awanwicake Wastewin

STRATE V. A-1 CONTRACTORS: INTRUSION INTO THE SOVEREIGN DOMAIN OF NATIVE NATIONS*

WAMBDI AWANWICAKE WASTEWIN**

With the decision in *Strate v. A-1 Contractors*,[1] the United States Supreme Court overstepped the bounds of the government-to-government relationship between Tribal nations and the United States.[2] The *Strate* decision follows a recent trend in the Supreme Court's decisions of judicial activism in terms of federal Indian law, and also signals a return to former anti-Indian underpinnings in its decisions of the early 1900s.[3] This article will examine: Part I, the legal background of the *Strate v. A-1 Contractors* decision; Part II, the *Strate v. A-1 Contractors* decision by the United States Supreme Court; Part III, the inherent sovereignty of Tribal nations and the conflicts with the *Strate* decision; and Part IV, the pragmatic future impact of the *Strate* decision on the exercise of tribal jurisdiction.

---

* This article is dedicated to two women who have greatly influenced my life. First, it is dedicated to Dorreen Yellow Bird, Arikara Nation, who held open the doors of law school so that I might walk through. She sets an example as a Native woman dedicated to making the lives of Native people better in everything that she does. Also, it is dedicated to Lisa Lone Fight, Arikara, Hidatsa, and Mandan Nations, who has inspired me by her example as a Native woman embodying all of the strength, compassion, commitment, and integrity of her nations. Finally, I would like to give special thanks to Diane Avery, Tribal Attorney for the Three Affiliated Tribes of the Fort Berthold Reservation, for her encouragement and support throughout the writing of this article.

** The author is a member of the Sisseton-Wahpeton Dakota Nation of the Lake Traverse Reservation. She received a Juris Doctor from the University of North Dakota School of Law in 1998 and a degree in Political Science from Stanford University in 1993.

1. 117 S. Ct. 1404 (1997).

2. *See* Janet Reno, *A Federal Commitment to Tribal Justice Systems*, JUDICATURE, Nov.-Dec. 1995, at 113. "In April of 1994, President Bill Clinton reinforced the longstanding federal policy supporting a substantial degree of self-determination for Indian [T]ribes. Federal agencies were directed to deal with Indian [T]ribes on a government-to-government basis when tribal governmental or treaty rights are at issue." *Id.*

3. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1574-75 (1996).

> Over the last fifteen years, partly as a result of [T]ribes' broader assertions of power over reservation activity, non-Indian interests have been allowed to play a greater role in Indian country jurisdictional disputes. As these disputes have reached the United States Supreme Court, several decisions have curtailed exercises of tribal governing power that cast a cultural shadow on non-Indian values, personal liberties, or property interests. The Court has become the arbiter of how much governing authority [T]ribes may exercise, assuming a prerogative that it formerly conceded to the political branches of government.

Id.

I. LEGAL BACKGROUND: *STRATE V. A-1 CONTRACTORS*

A. FACTS

On November 9, 1990, a gravel truck driven by Lyle Stockert, an employee of A-1 Contractors, collided with a small car driven by Gisela Fredericks on North Dakota Highway Eight[4] within the Fort Berthold Indian Reservation.[5] The Fort Berthold Indian Reservation is home to the Three Affiliated Tribes composed of the Mandan, Hidatsa, and Arikara Nations.[6] Mrs. Fredericks was not a member of the Tribes. However, she was closely related to the Tribes due to her marriage to an enrolled member and the enrollment of her five sons in the Tribes.[7] She also continued to reside on the allotment belonging to her husband following his death.[8] As a result of the car accident, Mrs. Fredericks was seriously injured and hospitalized for twenty-four days.[9] Lyle Stockert, at the time of the accident, was employed by A-1 Contractors and was driving a company truck.[10] A-1 Contractors had entered into a subcontract for construction work with a wholly owned tribal corporation, LCM, to provide services for a new community building in the Twin Buttes district of the reservation.[11]

B. LOWER COURT RULINGS: TRIAL COURT, NORTHERN PLAINS INTERTRIBAL COURT OF APPEALS, EIGHTH CIRCUIT PANEL, EIGHTH CIRCUIT *EN BANC* REHEARING

Mrs. Fredericks proceeded to file suit in the Three Affiliated Tribes' Tribal court against A-1 Contractors, Lyle Stockert, and Continental Western Insurance Co.,[12] and claimed $1,000,000 for personal

---

4. Brief for Petitioner at 3, Strate v. A-1 Contractors, 520 U.S. 438 (1997) (No. 95-1872).

> Highway 8 enters the southern boundary of the Reservation several miles south of Twin Buttes. The authority for Highway 8 to enter the Reservation is an easement granted by the Bureau of Indian Affairs to the North Dakota Highway Department on May 8, 1970 pursuant to 25 U.S.C. §§ 323-28. On the Reservation, Highway 8 crosses 6.59 miles of Indian trust land before it ends at the shores of Lake Sakakawea. Highway 8 does not cross any non-trust land within the Reservation.

Id.

5. A-1 Contractors v. Strate, 76 F.3d 930, 932 (8 th Cir. 1996), *cert. granted*, 518 U.S. 1056 (1996).

6. Brief for Petitioner at 2, *Strate* (No. 95-1872).

7. A-1 Contractors, 76 F.3d at 932.

8. Brief for Petitioner at 3, *Strate* (No. 95-1872).

9. *Id.*

10. *Id.*

11. *Id.*

12. *A-1 Contractors*, 76 F.3d at 933. "Continental Western was dismissed from the case without prejudice pursuant to an agreement of the parties." *Id.*

injuries and medical expenses.[13] Her sons also sought damages for loss of consortium.[14] The defendants[15] made a special appearance in Tribal Court to contest the Tribal Court's personal and subject matter jurisdiction over the action and moved to dismiss the suit.[16]

The motion was denied with the Tribal Court finding that it had adequate grounds for personal jurisdiction over Mrs. Fredericks, as a resident of the reservation, and over Lyle Stockert, as an employee of A-1 Contractors engaged in business within the reservation's boundaries.[17] The Tribal Court "concluded that A-1 Contractors failed to identify any federal law, treaty provision or provisions of the United States constitution which would preclude exercise of jurisdiction by the Tribal Court."[18] On appeal to the Northern Plains Intertribal Court of Appeals, the jurisdiction of the Three Affiliated Tribes' Tribal Court was affirmed and the case was remanded for further proceedings.[19]

In response, defendants, A-1 Contractors and Lyle Stockert, filed for declaratory and injunctive relief from the exercise of Tribal Court jurisdiction under 28 U.S.C. § 1331[20] in the federal district court for

---

13. Brief of Petitioner at 4, *Strate* (No. 95-1872).

14. *Id.*

15. Lyle Stockert, A-1 Contractors, and Continental Western were the defendants in the suit before the Tribal Court.

16. *A-1 Contractors*, 76 F.3d at 933.

17. *Id.*

18. A-1 Contractors v. Strate, No. 95-1872, 1992 WL 696330, at 1 (D. N.D. Sept. 16, 1992).

"The applicable tribal code provisions are as follows:
Chapter 1, Section 3: Jurisdiction of the Courts
Subsection 3.2—Jurisdiction—Territorial
The jurisdiction of the court shall extend to any and all lands and territory within the Reservation boundaries, including all easements, fee patented lands, rights of way; and over land outside the Reservation boundaries held in trust for Tribal members or the Tribe;
Subsection 3.3—Jurisdiction—Personal
Subject to any limitations or restrictions imposed by the Constitution or the law of the United States, the Court shall have civil and criminal jurisdiction over all persons who reside, enter, or transact business within the territorial boundaries of the reservation; provided that criminal jurisdiction over non-Indians shall extend as permitted by case law;
Subsection 3.5—Jurisdiction—Subject Matter
The Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation, and over all criminal offenses which are enumerated in this Code, and which are committed within the exterior boundaries of the Reservation.
Chapter 2, Section 3(f): Long Arm Statute. Any person subject to the jurisdiction of the Tribal Court during any of the following acts:
1) The transaction of any business of the Reservation;
2) The commission of any act which results in accrual of a tort action within the Reservation;
3) The ownership, use or possession of any property, or any interest therein, situated with in the Reservation."

Id. at 4-5.

19. Brief for Petitioners at 4, *Strate* (No. 95-1872).

20. *Id.* "Federal question jurisdiction provides: 'The district courts shall have original jurisdic

North Dakota.[21] The district court found that it had jurisdiction "under 28 U.S.C. § 1331, to determine the extent of Tribal Court jurisdiction since A-1 has exhausted Tribal Court remedies pursuant to the rule in *National Farmers Union Ins. Cos. v. Crow Tribe,* 471 U.S. 845 (1985)."[22] The district court held that under the Tribal Code, the Tribal Court had correctly exercised both personal and subject matter jurisdiction over the tort action at issue and denied the relief requested.[23]

An appeal was taken to the Court of Appeals for the Eighth Circuit, where a three judge panel reviewed the district court's judgment de novo.[24] The Eighth Circuit panel stated that "the question of tribal court jurisdiction is a question of federal law which we review de novo."[25] The panel affirmed[26] the district court's ruling and distinguished the *Montana v. United States* case on its face limiting Tribal jurisdiction over non-Indians for regulatory purposes only on fee lands.[27] A-1 Contractors had asserted that the *Montana* decision was applicable to the tort action and required a showing that Tribal jurisdiction had not been divested through treaty or act of Congress for the Tribal Court to have jurisdiction over non-Indians.[28] The panel considered, for the sake of argument, the applicability of *Montana* and found that if it were applied, the Tribal Court would still have jurisdiction over the instant tort action.[29] Circuit Judge Hansen, dissenting, found *Montana* applicable and emphasized the requirement that an overriding tribal interest must be asserted prior to the Tribal Court establishing jurisdiction over non-Indians within the territorial boundaries of the reservation.[30]

The Eighth Circuit granted a rehearing *en banc*[31] of the panel's determination with Circuit Judge Hansen authoring the opinion which reversed the panel.[32] The decision began with the assertion that *Mon-*

---

tion of all civil actions arising under the Constitution, laws, or treaties of the United States.'" 28 U.S.C. § 1331 (1994).

21. Brief for Petitioners at 4, *Strate* (No. 95-1872).

22. *A-1 Contractors,* No. 95-1872, 1992 WL 696330, at 1.

23. *Id.* at 5.

24. A-1 Contractors v. Strate, No. 92-3359, 1994 WL 666051, at 2 (8th Cir. Nov. 29, 1994) *rev'd en banc,* 76 F.3d 930 (8th Cir. 1995). *See* BLACK'S LAW DICTIONARY 435 (6th ed. 1990) (defining "de novo trial" as "trying a matter anew; the same as if it had not been heard before and as if no decision had been previously rendered.)"

25. *A-1 Contractors*, No. 95-1872, 1992 WL 696330, at 4 (citing Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294, 1300 (8th Cir. 1994)).

26. The panel affirmed in a two-to-one decision with Circuit Judge Hansen dissenting.

27. *A-1 Contractors,* No. 95-1872, 1994 WL 666051, at 4.

28. *Id.* at 3.

29. *Id.* at 5.

30. *Id.* at 7.

31. *See* BLACK'S LAW DICTIONARY, *SUPRA* NOTE 24, AT 526-7 (defining "en banc": "In the United States, the Circuit Courts of Appeal usually sit in panels of judges but for important cases may expand the bench to a larger number, when they are said to be sitting en banc").

32. A-1 Contractors v. Strate, 76 F.3d 930 (1996).

tana was the controlling law for the disposition of the case.[33] In *Montana*, the United States Supreme Court opined that Tribal jurisdiction over non-tribal members was possible in only two situations: "1) when nonmembers 'enter into consensual relationships with the [T]ribe or its members, through commercial dealing, contracts, leases, or other arrangements'; or 2) when a nonmember's 'conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the [T]ribe.'"[34] These are known as the *Montana* exceptions which, according to the United States Supreme Court, must be met prior to a Tribe asserting jurisdiction over non-tribal members.[35]

The Eighth Circuit then turned to the facts of the tort action to determine whether a tribal interest under one of the two exceptions would permit Tribal Court jurisdiction over Mrs. Fredericks, Lyle Stockert, and A-1 Contractors.[36] Turning to the facts of the tort action, the Court of Appeals ruled that there was no consensual relationship between the Tribe and A-1 Contractors relevant to the car accident because Mrs. Fredericks was a nonmember, that there was no tribal interest at stake, and that the car accident did not affect the Tribe to any significant degree.[37] Therefore, the *Montana* exceptions were not met and, according to the Eighth Circuit, the Tribal Court lacked jurisdiction over the tort action between Mrs. Fredericks, Lyle Stockert, and A-1 Contractors.[38] In a concurring and dissenting opinion, Circuit Judge Beam agreed with the majority that a 'tribal interest' was necessary for Tribal Court jurisdiction.[39] However, he disagreed with the majority's failure to find such a tribal interest in the tort action before the Eighth Circuit.[40] Instead, he chose to utilize the 'infringement test' and determined that in the instant case, if the state were to assert civil jurisdiction, there would be an infringement upon the right of tribal self-government which would violate the federal policies of tribal self-determination.[41]

A dissenting opinion, authored by Circuit Judge Gibson,[42] focused on the narrow reading given by the majority as to the inherent sovereignty of Tribal nations.[43] The threat posed by nonmembers "who

33. *Id.* at 934.
34. *Id.* at 935 (quoting Montana v. United States, 450 U.S. 544, 565-66 (1981)) (citations omitted).
35. *Id.*
36. *Id.* at 940.
37. *Id.*
38. *Id.* at 941.
39. *Id.* at 941-44.
40. *Id.* at 941. Circuit Judge Beam's opinion was joined by Judges Gibson, McMillian, and Murphy. *Id.*
41. *Id.* at 944.
42. *Id.* Circuit Judge Gibson's dissenting opinion was joined by Judges McMillian, Beam, and Murphy. *Id.*
43. *Id.* at 944.

happen to wreak havoc on tribal land" should be within the powers of the Tribe as one of "the most basic and indispensable manifestations of sovereign power."[44] The final dissenting opinion was authored by Circuit Judge McMillian and joined by Judges Gibson, Beam, and Murphy.[45] In this dissent, the presumption that Tribes affirmatively have inherent sovereignty absent a limitation by treaty or federal statute was found to be the basis for civil jurisdiction over the tort action.[46] The *Montana* case was distinguished on its facts as only precluding Tribal jurisdiction over the regulation of non-Indians on fee lands.[47] Finally, assuming that *Montana* was applicable, the car collision fell within the exceptions as involving an important safety issue for the Tribe.[48] Upon the petition of Gisela Fredericks and interested parties, the United States Supreme Court granted certiorari and ordered an expedited briefing schedule to review the Eighth Circuit's *en banc* ruling.[49] Justice Ginsburg authored the unanimous decision of the Court, affirming the Eighth Circuit's ruling that the Tribal Court lacked jurisdiction over the tort action because of the failure to identify a tribal interest as required by the *Montana* decision.[50]

C. LEGAL BACKGROUND: *MONTANA, NATIONAL FARMERS UNION,* AND *IOWA MUTUAL*

The issue of Tribal jurisdiction over Tribal lands has been contentious since the arrival of Europeans in North America.[51] With the advent of the treaty-making process, some rules were set down to govern the issue of jurisdiction between Tribes and the United States.[52] However, these rules were neither uniform nor generally well-known by settlers entering Tribal lands or by the Tribes accustomed to their own forms of justice, punishment, and remedies based on a case-by-case analysis.[53] With the imposition of reservation life, the Tribes were subjected to United States military governance usually through an agency office with-

44. *Id.*
45. *Id.* at 945.
46. *Id.* at 946 (citing to Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9, 18 (1987)).
47. *Id.* at 947.
48. *Id.* at 950.
49. Brief for Respondent at 3, *Strate* (No. 95-1872).
50. Strate v. A-1 Contractors, 520 U.S. 438 (1997).
51. *See* SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS 296-97 (1989) (detailing the experience of Tribes as having to "deal with a federal government that has waffled between its commitment to honor its treaty obligations to respect Indian lands and sovereignty and its desire to assimilate the [T]ribes and obtain their lands and resources").
52. *See* VINE DELORIA JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 3-6 (1983).
53. *Id.* at 111-13 (discussing the traditional tribal justice systems).

in the reservation and a nearby fort always prepared to descend upon the reservation inhabitants.[54]

In 1934, with the passage of the Indian Reorganization Act, Tribes were forced to develop and adopt Bureau of Indian Affairs—modeled constitutions which were to serve as the instruments by which reservation life would be regulated.[55] Under these models, the Tribes sought to rebuild their systems of law and order on the reservations and therefore, the emergence of Tribal Courts[56] began based on the Bureau of Indian Affairs' Courts of Indian Offenses.[57] Since 1934, Tribes have been rebuilding their justice systems through this foreign, English common law-based model and thus, asserting their jurisdiction once more over Tribal lands.[58] It is through this history that the line of United States Supreme Court cases concerning Tribal jurisdiction must be read to accurately address the reality of Tribal Nations.

The three primary cases that are focused on throughout the *Strate v. A-1 Contractors* case history are: *Montana v. United States,*[59] *National Farmers Union v. Crow Tribe*;[60] and *Iowa Mutual v. LaPlante*.[61] Each will be examined in turn for their relevance to the issues raised in the car collision occurring on the Fort Berthold Reservation.

1. *United States Supreme Court Decision in Montana v. United States*

In *Montana v. United States,* the Crow Tribe sought a declaratory judgment that it retain regulatory authority over hunting and fishing on fee land owned by non-Indians within its reservation boundaries based

---

54. *See* VINE DELORIA JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN 31 (1984) (commenting on the agents use of chosen tribal members to justify judicial and governmental actions).

55. *Id.* at 171-82 (giving an overview of the process by which the Bureau of Indian Affairs developed model constitutions for Tribes).

56. *See* Joseph A. Myers and Elbridge Coochise, *Development of Tribal Courts: Past, Present, and Future,* JUDICATURE, Nov.-Dec. 1995, at 147, 148. "A clear trend since the Indian Reorganization Act has been for [T]ribes to develop codes and convert from [Code of Federal Regulations] courts to tribal courts operating under tribal sovereignty." *Id.*

57. *See* FRANK POMMERSHIEM, BRAID OF FEATHERS 61-66 (1995) (illustrating the role of the Courts of Indian Offenses as extensions of the Bureau of Indian Affairs).

58. *See* Douglas B. Endreson, *The Challenges Facing Tribal Courts Today,* JUDICATURE, Nov.-Dec. 1995, at 142. "It is difficult to overstate the difference between the challenge Indian [T]ribes now face and those they faced for most of their more than 200-year relationship with the United States. From the treaty-making period, to the era of Indian removal, to the allotment policy and the horrors of the termination policy of the 1950s, Indian leaders battled to preserve tribal existence and to maintain the land and natural resource base necessary to sustain Indian culture. Throughout this struggle the [T]ribes were on the defensive—their lands, their resources, and their rights were always at risk." *Id.*

59. 450 U.S. 544 (1981).

60. 471 U.S. 845 (1985).

61. 480 U.S. 9 (1987).

on its ownership of the Big Horn River's bed and banks.[62] The United States Supreme Court held that the Crow Tribe did not remain the owner of the Big Horn River's bed and banks. This decision was based on English common law principles with the conclusion that the river's bed and banks were reserved by the United States federal government in trust for the future state of Montana.[63] The United States was a party to the action to seek declaratory judgment on behalf of the Crow Tribe and in support of the Tribe's ownership of the riverbed and banks.[64]

The Court's opinion set forth the reasoning that the 1851 and 1868 Treaties with the Crow Tribe should be construed pursuant to common law principles, rather than the doctrine of deference to the understanding of the Tribe at the time of signing the Treaty.[65] The Court also stated that because the United States government held an easement in the Big Horn River for navigability, it followed that the treaties with the Crow Tribe could not be literally interpreted to provide absolute exclusion by the Tribe within the Tribal territory.[66] Further, the Court stated that the Crow people ate mostly buffalo,[67] and therefore, having access to the river to fish was not significant to the Tribe.[68] After concluding that title to the Big Horn River's bed and banks passed from the United States to Montana when that state established itself, the Court found that the Crow Tribe could not exercise regulatory authority over non-Indians on fee land within the boundaries of its reservation.[69]

The Court relied upon the '*Oliphant v. Suquamish Tribe* decision[70] which held that Tribal Courts' lacked jurisdiction over non-Indians within reservation boundaries.[71] Based on this pronouncement, the Court opined that "the principles upon which [the *Oliphant* decision] relied support the general proposition that the inherent sovereign powers of an Indian [T]ribe do not extend to the activities of nonmembers of the [T]ribe."[72] Piecing together various prior Court decisions, the opinion

62. Montana v. United States, 450 U.S. 544, 547 (1981).
63. *Id.* at 554.
64. *Id.* at 549.
65. *Cf. id.* at 554 (applying common law principles to the facts of the case).
66. *Id.* at 555.
67. *Id.* at 556.
68. *Id.* It is interesting to note that the diets of Native people are relevant to the foundation of property rights according to the United States Supreme Court. *But see* Justice Blackmun's dissenting opinion stating that: "the factual premise upon which the Court bases its conclusion is open to serious question: while the District Court found that fish were not 'a central part of the Crow diet,' there was evidence at trial that the Crow ate fish both as a supplement to their buffalo diet and as a substitute for meat in time of scarcity." *Id.* at 571 (citation omitted).
69. *Id.* at 564-65.
70. 435 U.S. 191 (1978) (opinion authored by Justice Rehnquist, presently Chief Justice of the United States Supreme Court).
71. *Montana*, 450 U.S. at 565.
72. *Id.*

formulated the now oft-repeated language redefining the 'inherent sovereignty' of Tribal nations as perceived by that Court:

> To be sure, Indian [T]ribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A [T]ribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the [T]ribe or its members, through commercial dealing, contracts, leases, or other arrangements. A [T]ribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the [T]ribe.[73]

Applying this pronouncement, the Court found that it was unable to fathom the affect of non-Indian hunting and fishing along the Big Horn River within the reservation boundaries on the Tribe's political, economic, or social structure.[74] It therefore, held that the Crow Tribe was limited to regulating non-Indians within the reservation boundaries on parcels of land in the Tribe's possession or held in trust by the United States government for the Tribe.[75]

2. *United States Supreme Court Decision in National Farmers Union*

In *National Farmers Union v. Crow Tribe*,[76] a child of the Crow Tribe was struck and injured by a motorcyclist in the parking lot of the Lodge Grass Elementary School parking lot, a public school located within the boundaries of the Crow Reservation.[77] His guardian filed a civil action in Crow Tribal Court for medical expenses and pain and suffering against the school district and consequently, their insurer, National Farmers Union.[78] The defendants to the civil action failed to appear in Tribal Court, although they were served adequate notice, and a default judgment was entered for plaintiff.[79] The defendant insurance company and school district then filed a complaint in federal district court to

73. *Id.* at 565-66 (citations omitted).
74. *Id.* at 566.
75. *Id.* at 566-67.
76. 471 U.S. 845 (1985).
77. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 847 (1985).
78. *Id.*
79. *Id.* at 847-48.

enjoin enforcement of the default judgment.[80] The district court granted a temporary restraining order and when that expired, a permanent injunction was issued against the Tribal Court's enforcement of the default judgment.[81] To issue the permanent injunction, the district court determined both that: 1) as a federal court, it had jurisdiction over the matter pursuant to 28 U.S.C. § 1331;[82] and 2) that the Tribal Court lacked subject-matter jurisdiction over the complained of tort and therefore, over the default judgment as well.[83]

On appeal to the Ninth Circuit, a divided panel found that the district court could not support its exercise of jurisdiction on any "constitutional, statutory, or common law ground."[84] The United States Supreme Court found federal jurisdiction over a Tribal Court through the following circular argument:

> The question whether an Indian [T]ribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a [T]ribal [C]ourt is one that must be answered by reference to federal law and is a 'federal question' under § 1331. Because petitioners contend that federal law has divested the [T]ribe of this aspect of sovereignty, it is a federal law on which they rely as a basis for the asserted right of freedom from [T]ribal Court interference. They have, therefore, filed an action 'arising under' federal law within the meaning of § 1331.[85]

In essence, the Court is stating that because the petitioner's claim that federal law limits Tribal law, there is federal court jurisdiction.[86] An assertion of petitioner, the insurance company, does not establish federal court jurisdiction; rather, every court must satisfy itself as to its basis for jurisdiction determined by either the Constitution of the United States or through federal statute in every case as a fundamental matter of law in the United States.[87] And nowhere in the Constitution or in federal law is the jurisdiction of Tribal Courts expressly or impliedly said to arise from

---

80. *Id.* at 848.

81. *Id.*

82. 28 U.S.C. § 1331 (1994). Section 1331 provides in relevant part: "Federal question. The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

83. *National Farmers*, 471 U.S. at 848-49.

84. *Id.* at 849.

85. *Id.* at 852-53.

86. *Id.*

87. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.1, at 249 (2d ed. 1994) (stating that: "federal court jurisdiction cannot be gained by consent of the parties . . . . Accordingly, parties cannot bring matters to federal court where constitutional or statutory authority is lacking. Therefore, consent is never adequate to permit federal jurisdiction where none otherwise would exist").

the separate sovereign of the United States of America.[88] The tort action at issue was created under Crow Tribal law and neither implicates federal law nor involves state law.[89]

However, the United States Supreme Court did find federal subject matter jurisdiction in the lower federal district court based on the petitioners' assertion that federal law preempted Tribal Court jurisdiction and that this was therefore, an issue arising under federal law.[90] The Court went on to expound the *Oliphant* decision which held that Tribal Courts lack criminal jurisdiction over non-Indians within reservation boundaries.[91] Ultimately, *Oliphant* was distinguished as not applicable to the civil jurisdiction of Tribal Courts.[92] Relying on the Congressional policy of tribal self-government and self-determination, the Court created the 'exhaustion of tribal remedies' rule.[93] Until all Tribal Court remedies, including appellate procedures, have been exhausted, federal courts are directed to restrain assertion of federal jurisdiction.[94] In the final analysis, the United States Supreme Court seriously encroached upon Tribal Court jurisdiction with the *National Farmers Union* decision by finding Tribal Court decisions reviewable in federal court when one of the parties is non-Indian, with the slight delay of exhausting all available Tribal Court remedies.[95]

3. *United States Supreme Court Decision in Iowa Mutual*

In *Iowa Mutual v. LaPlante,* a member of the Blackfeet Tribe, Edward LaPlante, brought suit in Tribal Court against his employer, Wellman Ranch, located on the Blackfeet Reservation.[96] While driving a company truck, the plaintiff was injured. In Tribal Court, the insurance company for the Wellman Ranch, Iowa Mutual, sought to dismiss the complaint on two grounds: 1) that the jurisdiction for the Tribal Court was not properly alleged; and 2) that the Tribal Court lacked subject matter jurisdiction.[97] The Tribal Court ruled that it did have subject-

88. *See generally* U.S. CONSTITUTION.

89. *See* CHEMERINSKY, *supra* note 87, § 5.2 at 273-74 (stating that: "the current law concerning when cases arise under federal law for purposes of § 1331 can be summarized by the following principle: A case arises under federal law if it is apparent from the face of the plaintiff's complaint either that the plaintiff's cause of action was created by federal law or if the plaintiff's cause of action is based on state law, that a federal law that creates a cause of action is an essential component of the plaintiff's claim").

90. *National Farmers*, 471 U.S. at 853.

91. *Id.* at 853-55.

92. *Id.* at 855.

93. *Id.* at 856.

94. *Id.* at 857.

95. *Id.*

96. 480 U.S. 9 (1987).

97. *Id.* at 12.

matter jurisdiction over "the conduct of non-Indians engaged in commercial relations with Indians on the reservation."[98]

In response, the insurance company filed in federal district court asserting diversity jurisdiction[99] under 28 U.S.C. § 1332,[100] and seeking declaratory relief that the injuries sustained by LaPlante fell outside of the insurance company's policy coverage.[101] LaPlante filed a motion to dismiss the action in federal court.[102] The district court granted LaPlante's motion to dismiss based on lack of subject matter jurisdiction for the federal court.[103] The Ninth Circuit on appeal affirmed the district court's order that the Tribal Court first determine its jurisdiction over the action.[104] The United States Supreme Court then ruled that the full appellate process had not been satisfied in accordance with Tribal Court proceedings and therefore, federal jurisdiction was premature.[105] The Court stated that exhaustion of Tribal Court remedies was as necessary in diversity of citizenship cases as in federal question cases, which begs the question of where the original jurisdiction for reviewing Tribal Court decisions stems from in the first place.[106] The Court correctly noted the historical exclusion of Tribes from federal diversity jurisdiction:

> The diversity statute, 28 U.S.C. § 1332, makes no reference to Indians and nothing in the legislative history suggests any

---

98. *Id.*

99. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 477 (defining "diversity of citizenship [jurisdiction]" as: "A phrase used with reference to the jurisdiction of the federal courts, which under U.S. Const. Art. III, § 2, extends to cases between citizens of different states, designating the condition existing when the party on one side of a lawsuit is a citizen of another state, or between a citizen of a state and an alien").

100. *See* 28 U.S.C. § 1332(a), (d) (1994). § 1332 provides in relevant part:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between:
> (1) citizens of different States;
> (2) citizens of a State and citizens or subjects of a foreign state;
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> (4) a foreign state, defined in § 1603(a) of this title, as plaintiff and citizens of a State or of different States.
> (d) The word 'States,' as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

101. *LaPlante*, 480 U.S. at 12-13. It is unclear whether Iowa Mutual was asserting that LaPlante was either: 1) a citizen of another state; or 2) an alien. However, either assertion would be patently false as LaPlante would be categorized as a Tribal member outside the scope of these two classifications for diversity jurisdiction.

102. *Id.* at 13.

103. *Id.*

104. *Id.* at 13-14.

105. *Id.* at 17, (following the rule set forth in National Farmers' Union, 471 U.S. 845, 857 (1985)).

106. *Id.*

> intent to render inoperative the established federal policy promoting tribal self government. Tribal courts in the Anglo-American mold were virtually unknown in 1789 when Congress first authorized diversity jurisdiction, see Judiciary Act of 1789, § 11, 1 Stat. 78-79; and the original statute did not manifest a congressional intent to limit tribal sovereignty. Moreover, until the late 19th century, most Indians were neither considered citizens of the states in which their reservation was located, nor regarded as citizens of a foreign state, so a suit to which Indians were parties would not have satisfied the statutory requirements for diversity jurisdiction.[107]

The Court went on to note that Congress has amended the diversity statute and has never attempted to limit Tribal Court civil jurisdiction on the basis of that statute.[108] After this analysis, the Court then contradicts the previous statements as to the applicability of diversity jurisdiction over Tribal members by simply stating that the Tribal Court's "determination of tribal jurisdiction is ultimately subject to review."[109] The case was remanded for proceedings in Tribal Court prior to an assertion of federal review.[110] It appears that the *Iowa Mutual* decision expands the United States federal courts' encroachment into Tribal Court jurisdiction by adding diversity jurisdiction as a grounds of federal review, as well as the federal question jurisdiction imposed in the *National Farmers Union* decision.[111]

II. UNITED STATES SUPREME COURT RULING: *STRATE V. A-1 CONTRACTORS*

A. *MONTANA* AS THE PATHMARKING CASE FOR TRIAL COURT JURISDICTION

The decision opens with the statement that Tribes retain limited sovereignty over nonmembers and cites to the criminal jurisdiction decision of *Oliphant v. Suquamish Tribe,* where the Supreme Court held that Tribes completely lacked jurisdiction over nonmembers for criminal offenses.[112] Building on the *Oliphant* decision, the Court explained that

---

107. *Id.* at 17-18 (citations omitted).
108. *Id.* at 18.
109. *Id.* at 19.
110. *Id.* at 20.
111. It should be noted that based on these two opinions, the United States judiciary is requiring Tribal plaintiffs in Tribal Court to undergo full trial and appellate proceedings, and then the same process through the federal courts to sustain civil actions against non-Indians; nowhere else is this amount of litigation required of a tort plaintiff.
112. Strate v. A-1 Contractors, 117 S. Ct. 1404 (1997).

Montana v. United States was decided three years later, and should be considered "the pathmarking case concerning civil authority over nonmembers."[113] In the *Montana* decision, the issue before the Court was whether the Crow Tribe could regulate hunting and fishing within the reservation boundaries by nonmembers on fee land owned by nonmembers.[114] The Court held that the Tribe could regulate nonmembers on land owned by the Tribe or held in trust for the Tribe, but could not regulate nonmembers on fee land owned by nonmembers within the boundaries of the reservation.[115] The proposition that *Montana* supports, according to Justice Ginsburg speaking for the Court in *Strate*, is that the Tribe's inherent sovereignty does not extend to jurisdiction "over tribal nonmembers absent an express provision by treaty or statute."[116] The Court recognized two exceptions that will dictate Tribal Court jurisdiction.[117]

Montana thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.[118] After setting out the tenets of the *Montana* case and its exceptions, the opinion focused on the Court's reinterpretation of two of its other decisions: *National Farmers' Union* and *Iowa Mutual*, as not inconsistent with the *Montana* holding.[119]

B. RECONCILING *NATIONAL FARMERS' UNION* AND *IOWA MUTUAL* WITH *MONTANA*

The *Strate* opinion focused on the holdings in *National Farmers' Union* and *Iowa Mutual* as merely describing an exhaustion rule and not as recognizing Tribal Court adjudicatory jurisdiction.[120] The Court stated that its holding in *National Farmers' Union* centered on the question of whether or not the Tribal Court had exceeded its jurisdiction. As a matter of federal law, the Court decided the scope of Tribal Court jurisdiction was within the federal judiciary's powers of review.[121] In

113. *Id.*
114. Montana v. United States, 450 U.S. 544, 547 (1981).
115. *Strate*, 117 S. Ct. at 1409-10.
116. *Id.* at 1409.
117. *Id.* at 1409-10.
118. *Id.*
119. *Id.* at 1410.
120. *Id.*
121. *Id.* at 1411.

painstaking detail, the Court noted that *National Farmers' Union's* recognition of greater civil than criminal Tribal Court jurisdiction over nonmembers was not inconsistent with its interpretation of *Montana* as requiring Congressional authorization in statute or treaty for Tribal Court jurisdiction over nonmembers.[122] In conclusion, the *National Farmers' Union* decision was discovered to be no more than a procedural step in which Tribal Court's explain their jurisdictional analysis for the parties to an action at the Tribal Court's door.[123]

Next, the Court in *Strate* reassessed the *Iowa Mutual* decision and found that it embodied a prudent rule of allowing Tribal Court's to first address actions brought into that forum.[124] The tribal exhaustion rule was not characterized as jurisdictional, but rather prudential as a matter of comity and 'respect.'[125] Drawing on the citations to *Colville*,[126] *Fisher*,[127] and *Montana* decisions in the *Iowa Mutual* decision, the Court bolsters its assessment of *Iowa Mutual* as standing for "the unremarkable proposition that, where [T]ribes possess authority to regulate the activities of nonmembers, 'civil jurisdiction over [disputes arising out of] such activities presumptively lies in the [T]ribal [C]ourts.'"[128] To ensure conformity, the Court then expressly reiterated its statement that *National Farmers Union* and *Iowa Mutual* announce a prudential rule of comity and thus, do not affect *Montana's* proposition that Tribal Court's lack civil jurisdiction over nonmembers unless one of two exceptions are met.[129] The Court enunciated its rule based on the *Montana* decision that "as to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[130] In a final comment, the Court stated that Tribal Court jurisdiction in general does not extend to the activities of nonmembers unless authority is found in treaties, statutes, or through one of the two *Montana* exceptions.[131]

---

122. *Id.*

123. *Id.*

124. *Id.* at 1412.

125. *Id.*

126. *See* Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 152-53 (1980) (citing to the language: "The power to tax transactions occurring on trust lands and significantly involving a [T]ribe or its members is a fundamental attribute of sovereignty which the [T]ribes retain unless divested of it by federal law or necessary implication of their dependent status").

127. *See* Fisher v. District Court of Sixteenth Judicial Dist. of Mont., 424 U.S. 382, 387-89 (1976) (involving a child custody case where all parties concerned were tribal members and finding that the Tribal Court had a substantial interest to adjudicate the case).

128. *Strate*, 117 S. Ct. at 1413 (citations omitted).

129. *Id.*

130. *Id.* This fails to address the obvious fact that the Three Affiliated Tribe's Tribal Code did contain statutory language governing the Tribal Court's jurisdiction and laws pertaining to the tort action at issue in the Fredericks' litigation.

131. *Id.* at 1413.

C. THE LEGAL STATUS OF THE EASEMENT WHERE THE COLLISION OCCURRED

The Supreme Court then addressed the Tribal parties' contention that *Montana* involved Tribal jurisdiction on nonmember land by nonmembers, which was not true for the stretch of road on the Fort Berthold Reservation.[132] The Court patently settled the matter by stating that, contrary to principles of property law, "[t]he right-of-way North Dakota acquired for the State's highway renders the 6.59-mile stretch equivalent, for nonmember governance purposes, to alienated, non-Indian land."[133] Finding support in unilateral acts of Congress which authorized rights-of-way through Indian country, the Court concluded that just compensation had been paid pursuant to federal statute to the Tribes and therefore, all tribal interest had been extinguished.[134] In addition, the Court stated that because the Tribes had not reserved an interest in the easement, the Tribes lost all landowner's rights by following the federal procedures of giving consent for the easement.[135]

D. REQUIRING THE TRIBES TO PROVE JURISDICTION THROUGH A TREATY OR STATUTE

The opinion's final discussion faulted the Tribes for not providing any documentation from the era of treaty-making that would authorize jurisdiction for the purposes of tort law over nonmembers of the Tribes on their newly formed reservation.[136] In the absence of such an express treaty provision, the Court required authorization from Congress for the Tribes to exercise the sovereign governmental function of judicial power over tribal territory.[137] Finding, for obvious reasons, that neither of these novel requirements were met, the Court asserted that the fall-back position would be the two exceptions mentioned in their *Montana* decision to establish Tribal Court civil jurisdiction.[138]

The first *Montana* exception would find Tribal Court jurisdiction over the "activities of nonmembers who enter into consensual relationships with the [T]ribe or its members, through commercial dealing, contracts, leases, or other arrangements."[139] Although A-1 Contractor's sole reason for being on the reservation was for a business arrangement

132. *Id.*
133. *Id.*
134. *Id.* at 1414.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at 1414.
139. *Id.* at 1415 (citing Montana v. United States, 450 U.S. 544, 565 (1981)).

with the Tribes, the Court stated that this was not enough.[140] The Court indicated that Mrs. Fredericks was not a party to the subcontract between the Tribes and A-1 Contractors and therefore, the A-1 employee's collision with her did not involve the type of consensual relationship referred to in the *Montana* exception.[141] The types of activities implicated by the *Montana* exception were listed by the Court as Tribal jurisdiction over a sales transaction on the reservation, permit tax on livestock owned by nonmember on the reservation, permit tax on nonmembers doing business on the reservation, and taxing of cigarette sales to nonmembers on the reservation.[142]

The second *Montana* exception would find Tribal Court jurisdiction when a nonmember's conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the [T]ribe."[143] While the Court acknowledged that reckless driving within the reservation could jeopardize the safety of Tribal members, it foreclosed the exercise of public safety as an avenue for Tribal Court jurisdiction over nonmembers under this second Montana exception.[144] Rather, the Court listed two examples which were within the second exception: 1) an adoption proceeding where all of the parties were Tribal members; and 2) a merchant seeking payment for goods against Tribal members.[145] The Court relied on its previous cases dealing with specifically state judicial intrusion as an example of infringing upon the exercise of Tribal governments[146]

To further illustrate this point, the Court offered two cases in which state judicial intrusion did not 'unduly' infringe on Tribal Court jurisdiction.[147] Both cases upheld the taxing of nonmember livestock by a state or territory when the livestock was on leased Tribal land, and found that the tax did not interfere with the Tribes' tax-free status of property under the United States Constitution.[148] In the final analysis, the opinion articulated the assertion that the second exception would only be available when the state interfered with a Tribe's exercise of jurisdiction over conduct which would endanger internal tribal relations or in a very narrow sense Tribal self-government.[149] In a footnote to this narrow rule, the Court noted that "[w]hen, as in this case, it is plain that no

140. *Id.*
141. *Id.*
142. *Id.* (citations omitted).
143. *Id.* (citing to *Montana* 450 U.S. at 566).
144. *Id.*
145. *Id.* at 1415.
146. *Id.*
147. *Id.* at 1415-16.
148. *Id.*
149. *Id.* at 1416.

federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that Tribal [C]ourts lack adjudicatory authority over disputes arising from such conduct."[150] The end result of the *Strate* decision based on the above analysis was to deny Tribal Court jurisdiction over the vehicular collision to Mrs. Fredericks because:

> Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes].[151] (emphasis added)

The *Strate* Court held in a unanimous opinion that the Tribal Court lacked subject matter jurisdiction over the car collision within the boundaries of the Reservation.[152]

III. CONFLICTING VIEWS OF SOVEREIGNTY AND COURT JURISDICTION

The United States Supreme Court in the *Strate* decision takes the view that inherent tribal sovereignty is somehow based upon or subject to federal law.[153] By examining the meaning of "inherent" and "sovereignty," a different conclusion is reached. An inherent power cannot be divested, diminished or discarded. On the contrary, an inherent power exists whether it is exercised or not, without any limitations, and for all time.[154] Sovereignty as legally defined is:

> The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; the supreme will; paramount control of the constitution and frame of Government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is

150. *Id.* at 1416 n.14.

151. *Id.* at 1416 (citing Montana v. United States, 450 U.S. 544, 566(1981)).

152. *Id.*

153. *See id.* at 1409 (stating that the inherent powers of Tribes are somehow limited by *Montana).*

154. *See* BLACK'S LAW DICTIONARY, *supra* note 24, at 782 (defining "inherent powers" as: "An authority possessed without its being derived from another. A right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another. Powers originating from the nature of government or sovereignty, i.e., powers over and beyond those explicitly granted in the [United States] Constitution or reasonably to be implied from express grants").

> sovereign and independent. The power to do everything in a state without accountability, to make laws to execute and to apply them, to impose and collect taxes and levy contributions, to make war or peace, to form treaties of alliance or of commerce with foreign nations, and the like.[155]

Inherent sovereignty cannot be subject to another nation or judicial system. Inherent tribal sovereignty is thus, the absolute power of the Tribes to be independent nations and to carry on their affairs without accountability. The Tribes may enter into agreements with other nations and bind themselves to those agreements for the benefit of both nations, similar to, at least conceptually, the treaty-making era with the United States and prior to that Great Britain and prior to that agreements between the Tribes.[156] However, these agreements do not then subsume the inherent sovereignty of the Tribes; rather the agreements logically flow from the power of the Tribes to enter into them as sovereigns.[157]

This is also true for the exercise of the Tribal Court system which is an extension of the inherent sovereignty of Tribes.[158] The Tribal Court system is necessary for the proper enforcement and adjudication of the sovereign's laws. Any limitation upon the Tribal Court's authority must be found within its own internal Tribal Code, long-arm statutes, and prudential concerns. The Tribal Court systems have been forthright and wise in their exercise of jurisdiction and have established the limits of their authority as the limits of the tribal landbase. Upon entering a reservation or tribal community, signs clearly indicate that the traveler has entered the tribal landbase. This should serve as clear notice that the traveler will become subject to Tribal Court jurisdiction based on entering the tribal landbase.[159]

---

155. *Id.* at 1396.

156. *See* Vine Deloria, Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 970 (1996). "Although the Constitution did not specifically identify the Indian nations as political entities with whom the United States might treat, pressure from settlers on the frontier and traders who dealt with Indians, as well as competition from England and Spain, made it imperative that the new American nation recognize the Indians as capable of entering into diplomatic relationships." *Id.*

157. *See* Daniel T. Campbell, *The Courts, The Government, and Native Americans: The Politics and Jurisprudence of Systematic Unfairness*, 3 RACE & ETHNIC ANCESTRY L. DIG. 30, 41 (1997). "According to international law principles, there are four requirements for sovereign nation status: 1) the entity must have a population, which the Native Americans obviously have as evidenced by their heritage; 2) the entity must have a territory, which the Native Americans have in the form of reservations; 3) the entity must have a structure of governance, which the Native Americans have in the form of tribal councils; and 4) the entity must have the capacity to conduct relations with other nations, which the Native Americans have proven through their negotiations with the U.S." *Id.*

158. *See* Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, JUDICATURE, Nov.-Dec. 1995, at 128. "The administration of justice, law, and order is a function of government retained by the [T]ribes as sovereign nations." *Id.*

159. *See* Janelle King, *Tribal Court General Civil Jurisdiction Over Actions Between Non-Indian*

The United States and its citizens are very comfortable with this fundamental concept when they visit England, France, Spain, or Portugal.[160] However, there is an emphatic resistance to this fundamental concept when they visit Indian country under the jurisdiction of Tribes. The extent of this resistance is evidenced in Respondent's Brief for the *Strate* decision. In Respondent's Brief, an attack is leveled against the fair administration of justice in the Three Affiliated Tribes' Tribal Court system without any basis for the horrors that are paraded in the guise of legal argument.

> This case presents serious issues for non-Indian citizens of western states like North Dakota, who live in or travel across the boundaries of Indian reservations, and potentially for Indians who are not members of the [T]ribe occupying such reservations. If non-Indians or nonmember Indians, for whatever reasons, cross reservation lands on county, state, or federal roads, under petitioners' construction of federal Indian law, they run the risk of being forced into a tribal civil court within a system of justice foreign to them. There, the risk of financial and personal ruin without federally protected constitutional due process or equal protection protections is very real.[161]

When a citizen of the United States travels to France, that citizen cannot claim the protections of the United States Constitution in an action in French Courts. The Three Affiliated Tribes, the United States, and France are all constitution-based governments and it behooves a traveler to become familiar with the laws of the jurisdiction where they choose to enter. However, bias was not only present in Respondent's Brief, it was apparent in the United States Supreme Court's final statements in the *Strate* decision:

> Gisela Fredericks may pursue her case against A-1 Contractors and Stockert in the state forum open to all who sustain injuries on North Dakota's highway. Opening the Tribal Court for her

---

Plaintiffs and Defendants: Strate v. A-1 Contractors, 22 AMER. IND. L. REV. 191, 211-12 (1997).

> Citizens of one state travel through other states frequently with the understanding that such conduct makes them subject to that sovereign's laws. No distinction should arise when such activity leads them into reservation boundaries. In the instant case, a sign had been posted alerting travelers that they were entering that reservation. This should function as sufficient notice for all concerned.

Id.

160. *See* Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 UTAH L. REV. 1105, 1109. "International law should be applied to the relationship between the United States and the Indian [T]ribes. The only legal foundation for Congress' power to deal with Indian [T]ribes outside the norms of international law is the doctrine of discovery which should have been repudiated long ago." *Id.*

161. Brief for Respondent at 6, *Strate* (No. 95-1872).

> optional use is not necessary to protect self-government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to "the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes]."[162] (emphasis added)

By furthering the 'unfamiliar court' argument, the United States Supreme Court has driven a wedge between the tribal systems of justice and their neighboring state's citizens.[163] State citizens will not become familiar with a court in which they do not enter, nor will state-licensed attorneys. It seems patently unfair to argue that a court system is unfamiliar and will always be unfamiliar. In essence, the United States Supreme Court has sought to isolate the tribal systems of justice and increase hostilities between tribal members and state citizens, each with their own court system, which is fine until a dispute arise between the two.[164]

Furthermore, the United States Supreme Court has recently authorized itself and the federal court system review of the Tribal Court systems.[165] The sole basis for this authority is found according to the federal courts in the language of 28 U.S.C. § 1331, which grants federal jurisdiction for issues arising under the laws, treaties, or constitution of the United States. It defies logic that the Tribal Court systems have arisen from federal law, rather the Tribes are inherently sovereign and are not accountable to another sovereign.

Not only have the federal courts granted themselves the power to review Tribal Court decisions based on the fiction of arising under federal law, but they have expanded that review to matters of diversity jurisdiction. In *Iowa Mutual,* the United States Supreme Court expressed its opinion that after the exhaustion of Tribal Court jurisdiction, the dispute

---

162. Strate v. A-1 Contractors, 117 S. Ct. 1404, 1416 (1997) (citing Montana v. United States, 450 U.S. 544, 566 (1981)).

163. *See* Stanley G. Feldman & David L. Withey, *Resolving State-Tribal Jurisdictional Dilemmas,* JUDICATURE, Nov.-Dec. 1995, at 156. "Effective state and tribal court communication and cooperation is achievable. Although mutual respect, understanding, and cooperation cannot be legislated, much can be accomplished by person-to-person communication and sharing information among tribal and state judges and court staff." *Id.*

164. *See* Feldman & Withey, *supra* note 163, at 156. "State and tribal courts serve everyone in the jurisdictions in which they operate, even though people traveling or doing business over jurisdictional borders do not always recognize the legal significance of those borders until they become involved in a crime or dispute." *Id.*

165. *See* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions,* 46 U. KAN. L. REV. 241, 254 (1998). "As noted, the tribal exhaustion doctrine contemplates some level of federal court review. Tribal [C]ourt decisions are thus not treated like state court decisions in cases where federal courts abstain in favor of state courts." *Id.*

could be brought to federal court upon diversity of citizenship grounds.[166]

Diversity of citizenship grounds may be theoretically more consistent with the status of tribal members and state citizens.[167] However, the basic procedure of diversity cases is to apply the underlying applicable state law to govern the case.[168] This appears to be a back door attempt by the federal courts to: 1) review Tribal Court decisions, which are the decisions of another sovereign; and 2) by applying a de novo[169] standard, seeking to decide a case by applying state law or reinterpret tribal law.[170] The diversity of citizenship method of reviewing a Tribal Court decision may therefore be a short cut from dismissing the suit and requiring that the parties seek adjudication in state court.[171] By using diversity of citizenship, the federal court may apply state law without requiring direct state court litigation.[172] Either way, the Tribal Court system is being subordinated to both the federal and state courts of the United States and this is contrary to the Tribes' inherent sovereignty.[173]

---

166. *See* Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 16 (1997).

167. *See* CHEMERINSKY, *supra* note 87, at § 5.3.3 (explaining that for a diversity action in federal courts, there must be complete diversity between all plaintiffs and all defendants, that each party "must be a citizen of a state or a citizen only of a foreign country, and "a person may not sue or be sued in a diversity case if he or she is a citizen of the United States, but not a citizen of a particular state").

168. *See* CHEMERINSKY, *supra* note 87, at § 5.3.5 (tracing the *Erie* doctrine as determining that state law be applied in diversity jurisdiction cases befor the federal courts). "Although some of the reasoning in the *Erie* decision has been questioned, its holding is widely accepted; in diversity cases, federal courts are to apply state law, including state common law." *Id.*

169. *See* A-1 Contractors v. Strate, No. 92-3359, 1994 WL 666051, at 2 (8th Cir. Nov. 29, 1994) (reviewing de novo the federal district court's dismissal of the suit brought by A-1 Contractors and Stockert for an injunction against the Three Affiliated Tribes' Tribal Court).

170. *See* Royster, *supra* note 167, at 280 (arguing that tribal law applies for diversity actions in federal courts).

171. *See* Strate, 117 S. Ct. at 1409 n.4.

172. *But see* Royster, *supra* note 165, at 280 (stating that "[a]ny diversity case raising a colorable claim of tribal jurisdiction should be sent to [T]ribal [C]ourt for exhaustion of tribal remedies). In [T]ribal [C]ourt, the merits will be determined according to tribal law, and on post-exhaustion review the federal courts will be precluded from re-litigating those [T]ribal [C]ourt determinations of tribal law"). *Id.*

173. *See* Laurie Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction*, 73 N.C. L. REV. 1089, 1135 (1995) (stating that ". . . the tribal exhaustion rule has become a jurisdictional bootstrap, creating federal question jurisdiction for many disputes previously found to be outside the purview of the federal courts").

IV. PRAGMATIC RESULTS OF THE *STRATE* DECISION

With Tribal Court jurisdiction under direct challenge in the courts of the United States, it may seem logical that the Tribes refrain from adjudication within the courts of the United States.[174] However, it is important to remember that once the parties to a Tribal Court dispute are able to seek and acquire hearing in the federal system, the Tribe must defend its jurisdiction and thus, become a party to a case before another sovereign.[175] The *Strate* decision originated in Tribal Court as a tort claim, but it was through the aggression of the defendants that a suit against the Tribal Court gained access to federal jurisdiction.[176] The Tribal Courts face hostility from both aggressive defendants and the neighboring state and federal judicial systems.[177] In response to this situation, the Tribes are left in a kind of stand-off as they become aware

---

174. *See* Michael C. Blumm & Michael Cadigan, *The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction Over Indian Cases*, 46 ARK. L. REV. 203, 214-15 (1993).

> In addition to abandoning longstanding principles of federal Indian law, the Supreme Court is a poor choice as ultimate decision-maker in Indian law matters because whenever the modern Court is faced with a case that implicates the interests of three sovereigns; a tribe, a state, and the federal government, the Court has proved institutionally incapable of protecting tribal interests.

Id.

175. *See* Phillip Allen White, *The Tribal Exhaustion Doctrine: "Just Stay on the Good Roads, and You've Got Nothing to Worry About,"* 22 AMER. IND. L. REV. 65, 65-66 (1997). "Indeed, if [T]ribes were merely afforded a reasonable equivalent to the geographically-defined scope of subject matter jurisdiction enjoyed by states, there would be no need for anything like an exhaustion doctrine. Instead, we have a circumstance in which virtually any tribal controversy involving a non-Indian can be, after some measure of appropriate procedures are followed, transformed into a federal dispute. In those cases, the focus is not the parties and the dispute they must resolve. Rather, the focus becomes a frustrating argument between the [T]ribal [C]ourt, fervently guarding whatever it is that remains of tribal sovereignty, and a non-Indian party, who argues just as zealously that such a thing as tribal sovereignty has probably not existed since sometime in the fifteenth or sixteenth century." *Id.*

176. *See* Reynolds, *supra* note 173, at 1135-36. "It is difficult to argue that tribal sovereignty is enhanced by [the tribal exhaustion rule] that treats the decisions of the [T]ribe's highest judicial body as open to re-litigation in the lower federal courts." *Id.*

177. *See* Getches, *supra* note 3, at 1594-95. "In at least seventeen decisions since 1980, the Supreme Court has marked out the boundaries of Indian self-government, arguably pursuing its own notion of what is desirable instead of being disciplined by established tests and rules. These cases have ignored guidelines for construing treaties, which were designed, after all, to make reservations permanent enclaves where Indians could exist relatively free of non-Indian control." *Id.*

of the specific techniques the federal courts are employing to disregard tribal sovereignty.[178]

Central to the *Strate* decision was the legal status of the easement within the reservation boundaries. Tribes were not aware that tacit consent to the granting of rights-of-way for roads within the reservations would lead to the federal courts finding a divesture of Tribal Court jurisdiction. But now that they are aware, the Tribes can alter future agreements concerning rights-of-way.[179] Unfortunately, this will leave the Tribes in a permanent reactive stance as they await the next federal decision that encroaches upon Tribal Court jurisdiction to counteract its specific effects.[180] The Tribes must take a proactive stance and remind the United States that as inherent sovereigns their jurisdiction is not open to interpretation by the United States.[181] As sovereigns, the Tribes and the United states entered into formal treaties, so that peace would be possible between the Tribes and the immigrants who form the United States, which the United States Supreme Court has conveniently disregarded.[182]

---

178. *See* White, *supra* note 175, at 169. "At worst *Strate's* inevitable chilling effect may mark the beginning of the end for [T]ribal [C]ourts: while a plaintiff may have a sincere desire to bring their action in [T]ribal [C]ourt, no reasonable person is going to seek unnecessarily protracted jurisdictional disputes, the need for dual filings to protect a cause of action from expired State statutes of limitation, and interminably delayed remedies." *Id.*

179. *See* Frank A. Demolli, *A Pueblo's Response to Strate v. A-1 Contractors*, 14 T.M. COOLEY L. REV. 541, 552 (1997) (describing the Pueblo of Pojaque's response to *Strate* as inserting into their current and future right-of-way agreements with New Mexico the following clause: "The Pueblo of Pojaque reserves civil jurisdiction and any applicable criminal jurisdiction over this right-of-way" and describing that the proposed highway construction negotiations came to a "screaming halt").

180. *See American Indian Law—Tribal Court Civil Jurisdiction—Ninth Circuit Holds that Blackfeet Tribal Court Lacks Subject Matter Jurisdiction over Tort Suit Arising on Reservation Between Member and Non-member—Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), 111 HARV. L. REV. 1620 (1998).

> Recently in *Wilson v. Marchington*, the Ninth Circuit held that the Blackfeet Tribal Court lacked subject matter jurisdiction over a tort suit arising from an auto accident involving a registered tribal member and a nonmember on a highway within the reservation. In so doing, the Ninth Circuit misinterpreted the Supreme Court's decision in *Strate v. A-1 Contractors* and seriously undervalued the [T]ribe's interest, which should have been deemed sufficient to warrant a finding of subject matter jurisdiction.

Id.

181. *See* The Hon. Ada Deer, *Tribal Sovereignty in the Twenty-First Century*, 10 ST. THOMAS L. REV. 17, 18 (1997). "Along with the steady erosion of funds, the last two years have witnessed bold and direct assaults on tribal sovereignty. We must continue our vigilance, such as protesting and speaking out against situations . . . ." *Id.*

182. *See* Getches, *supra* note 3, at 1594-95.

> [The United States Supreme Court] now gauges tribal sovereignty as a function of changing conditions—demographic, social, political, and economic—and the expectations they create in the minds of affected non-Indians. In the emerging jurisprudence of Indian law, the Court arrogates to itself the role of reviewing and weighing non-Indian interests, and ultimately, of redesigning the sovereignty of Indian [T]ribes.

Id.

The Tribes have sought to keep their word even in the face of horrendous events and deceit. The Mandan leader, Four Bears, alive at the establishment of the Fort Berthold Reservation, witnessed this deceit and betrayal when the smallpox virus was intentionally introduced into his community. His words reveal the level of betrayal that has been felt by Tribes when the United States and its citizens have acted dishonorably:

> My Friends one and all, listen to what I have to say—ever since I can remember, I have loved the whites. I have lived with them since I was a boy, and to the best of my knowledge, I have never wronged a white man. On the contrary, I have always protected them from the insults of others which they cannot deny. Four Bears never saw a white man hungry, but [t]hat he gave him to eat, drink, and a buffalo skin to sleep on in time of need. I was always ready to die for them which they cannot deny. I have done everything that a [Native man] could do for them, and how have they repaid it! With ingratitude! I have never called a white man a dog, but today I do pronounce them to be a set of black-hearted dogs, they have deceived me, them that I have always considered as brothers, has turned out to be my worst enemies. I have been in many battles, and often wounded, but the wounds of my enemies I exalt in, but today I am wounded, and by whom, by those same white dogs that I have always considered and treated as brothers. I do not fear death my friends. You know it, but to die with my face rotted [from smallpox], that even the wolves will shrink with horror at seeing me and say to themselves, that is Four Bears, the friend of the whites—listen well that I have to say, as it will be the last time you will hear me. Think of your wives, children, brothers, sisters, friends, and in fact all that you hold dear, are all dead or dying with their faces rotten, caused by those dogs the whites, think of all that my friends, and rise all together and not leave one of them alive. Four Bears will act his part.[183]

Four Bears' words illustrate the many injustices that Tribes have endured as they continue to foster a workable relationship with the

183. FRANCIS CHARDON, CHARDON'S JOURNAL AT FORT CLARK 1830-1839 124-125 (Annie Heloise Abel ed., 1932).

United States. When the United States Supreme Court hands down an opinion in direct contravention of the Tribes' inherent sovereignty, such as the *Strate* decision, it is but one more injustice the Tribes endure in keeping their end of the treaties.[184]

---

184. *See* Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 96-97 (1993).

> In rendering these [recent] decisions, the Court has treated tribal governments and their authority in ways that would be inconceivable where the state and federal governments are concerned, without any convincing reason for so doing . . . . These cases reveal the Court's increasing unwillingness to respect tribal sovereignty, despite the principles established in the Cherokee [Nation] Cases, solemn treaty promises and federal programs aimed at supporting tribal governments. Recent decisions thus demonstrate the Court's potential to do more damage to [T]ribes and the vitality of tribal governments than the cavalry ever did.

Id.